

Who's next? On the Future of the Rule of Law in Poland, and why President Duda will not save it

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With the latest draft laws about the judiciary, the Law and Justice party (PiS) has crossed yet another line. President Duda's announcement of a veto appears on first sight to present an obstacle to PiS' march towards completely unrestricted, unitary state power. In this post, I will examine first what effects the PiS drafts will have on the independence of the judiciary by the hands of PiS and then, whether or not President Duda's so-called veto holds what it seems to promise.

Three powers become one

Last week parliament passed a bill of amendment to the Act on the National Council of the Judiciary (NCJ), the special selection board that decides who fills judges' positions, thereby giving politicians full control over the appointment and promotion of judges. Parliament also passed a bill of amendment to the Courts Act which gives the Minister of Justice huge influence over presidents heading the work of the courts.

As if this were not enough, on Wednesday evening another bill on the judiciary was passed to the Sejm which supplements the above steps in PiS's plans for unitary state power. Their executive takeover of the NCJ would be of little use if there were no vacancies that board could fill, and the specific aim of the latest bill, which targets the Supreme Court, is to create vacancies at the very top of the judicial hierarchy. Almost overnight, all Supreme Court judges, except those chosen by Minister of Justice are to be sent into retirement.

This latest onslaught on the independence of the judiciary shows that the multi-stage process of violating the Polish Constitution, which started with an attack on the Constitutional Tribunal (CT) and the National Broadcasting Council, is fully underway. PiS's serial violation of the Constitution is obliged by its political programme of changing the state system without officially amending the Constitution, for which it does not have a sufficient parliamentary majority. As the CT is now fully (and unlawfully) under PiS's control, the Constitution is becoming something of a dead letter.

The attack on the separation of powers was objected to in almost all legal environments: advocate and attorney-at-law councils and even prosecutors' associations. The changes were condemned by the parliamentary opposition, which has called for mass protests. Strong criticism has also come from abroad. As if in response to the outcry against the government, the Polish Foreign Ministry sent a declaration of friendship to Turkey and President Erdogan on the anniversary of last year's failed coup. Let us hope that the Turkish president, who had no hesitation in throwing hundreds of judges into prison, has not been chosen as a role-model by the increasingly autocratic PiS government.

Following its executive takeover of the CT, the government uses it in a way akin to a thief who regularly requests a court to confirm that he has still not stolen anything: the applications filed with the CT in the past six months by the Minister of Justice and PiS MPs are not aimed at assessing constitutionality, but are tools in a political battle. Some applications are requests for the CT to legitimise constitutionally doubtful measures, some are clear attacks on government opponents. Recent applications have challenged the selection of wayward CT judges, questioned the legality of the selection of the Supreme Court President (who, it goes without saying, is critical of the government), and the right of the Supreme Court (SC) to issue resolutions. This last application was filed with the CT after the notorious SC resolution finding that the President did not have the right to pardon the head of the Secret Services, Mariusz Kamiński, for a court case against him before it is resolved.

If the mechanism to use the CT as a tool in the political battle is repeated in the case of the Supreme Court and common courts, the outlook will be bleak for justice in Poland. The law can be a very dangerous tool in the hands of unscrupulous authorities: criminal law gives them the possibility of removing any opposing politician from public life, as a criminal conviction is a disqualification for running for parliament or president. If both the prosecutors' offices and the courts, including the Supreme Court, are under the control of the executive, this becomes a very real possibility.

PiS has no doubt learned the lessons of its previous tenure with regard to the judicial system. The current (and former) Minister for Justice, Zbigniew Ziobro, is unlikely to repeat the mistake he made in 2006 against Dr. Garlicki, a cardiac surgeon who was accused of murdering patients. Then, after an infamous public charge violating the principle of innocent until proved guilty ("no one will ever have their life taken by this man again"), Ziobro improvidently put the accused person in the hands of the court, which found him not guilty. With full control of the judicial process, the Minister can be more certain that if he brings charges against someone, the outcome is less likely to contradict his will.

Political control of the courts poses a danger to businesses too. The Minister for Finance has legitimate power to question any tax returns filed in the last six years. In any normal country, if the tax administration questions a return, the tax decision can be appealed to a court which is independent of the administration. In a country in which both the administration and the courts are fully controlled by the same authority (the executive), appeals are pointless, especially if a clear directive is given beforehand that the state requires funds to continue costly social programmes.

Moreover, once the state administration knows that the spectre of its decisions being overturned by the courts has been dispelled, it may become increasingly brazen and undertake more daring actions, especially if they are assessed in terms of their effect rather than their lawfulness. The risk of groundless charges being brought against entrepreneurs will increase in direct proportion to the reduction in the possibility of their independent judicial review.

Last but not least, a court controlled by politicians is a threat to ordinary citizens, whose entire lives are bound by the law, from the certification that proves their birth to that which confirms their death. Legal decisions underpin education, rights to hold property, to travel, and to receive benefits. In the wrong hands, the law provides an extremely dangerous multi-purpose tool, which can be used for deprivation of rights, silencing of dissent, and exertion of pressure. For example, the Polish Constitution provides that fair compensation must be given for expropriation, but under the current programme, whether or not compensation is fair will be assessed by a court which is dependent on the expropriating party. Similarly, where proceedings are re-opened, a person has the right to defend him or herself in court. But will a judge whose fate depends wholly on a politician act against their interests?

A paraphrase of provisions of the Constitution that I was recently sent in private correspondence summarizes the situation well. The author writes that after control has been taken of the NCJ and the Supreme Court, article 10(2) of the Polish Constitution on the separation of powers will read as follows:

Legislative power is exercised by Law and Justice [PiS], executive power is exercised by Law and Justice, and judicial power is exercised by Law and Justice.

Worse still, the unity of state power arising from this provision may not only prevail in Poland but may become deeply rooted. Once the planned amendments enter into effect, the validity of elections to the Sejm and the Senate in Poland will, according to article 101(1) of the Constitution, be confirmed by *Law and Justice* (previously by the Supreme Court). But this will have nothing in common with true law and true justice.

Not much of a Veto after all

Yesterday, President Duda appeared to be ready to veto the draft legislation that allows Law and Justice to

commandeer the Supreme Court. This glimmer of hope for those increasingly disillusioned with the President's distance from his own political stable is in fact an [ignis fatuus](#): rather than signalling a refusal to sign in the legislation on the grounds of merit (he did not present any criticism against the draft law), his projected objection is conditional on rejection of his amendment to another draft.

That other draft is the statute on the National Council of Judiciary, which was finalized last week; it gives the parliamentary majority the right to appoint the members of the Council and by doing so influence the appointment of all Polish judges. The President's proposed amendment is to introduce a qualified (3/5) majority for appointing members of the Council; its ostensible objective is to assure that any appointees will be supported by more than one political party. At face value, the proposal seems a good one, but deeper analysis reveals that it is not.

First, it shows the President's acceptance of the principle (promoted by PiS in their draft legislation) that members of the Council should in future be appointed by politicians rather than by judges, as it is now. Understandably, the Polish association of judges has criticized the President's proposal as unconstitutional.

Second, the qualified majority will affect only the members of the Council who are judges, not those who are politicians. The problem is that the new Council will comprise two chambers: a judicial and political one; what is more, the political chamber will be able to block any judicial nomination supported by the judicial chamber. As a consequence, the President's proposal will not actually change the balance of power in the Council, which is in favour of the political will.

Third, a 3/5 majority is likely to lead to parliamentary stalemates, which will be very advantageous for Law and Justice. The new regulation on the Supreme Court introduces a mechanism of silent consent of the Council for all nominations to the Supreme Court submitted to it by the Minister of Justice. As a consequence, a stalemate in the appointment of the Council members will make it even easier for the Minister to pack the Supreme Court with his judges: if the Council is not able to oppose nominations within 14 days, the nominees can be sworn in by the President. If the members of the Council cannot be chosen, the Minister for Justice will have carte blanche to pack the Supreme Court.

In short, the President's conditional veto does not change much in terms of Law and Justice's methodical take-over of the Polish judiciary, but merely represents the loss of another opportunity to display political independence. Such a display would require a full Presidential veto against all the planned amendments concerning the Polish judiciary, and not the ineffective palliative measure he proposed yesterday.

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